No. 73-989

MICHAEL RODAK, JR

In the Supreme Court of the United States

OCTOBER TERM, 1973

GEORGE DEMET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
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Petitioner contends that the government failed to prove that certain payments he received both affected interstate commerce and constituted extortion.

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of affecting interstate commerce by extorting money and liquor from the owner of a cocktail lounge, in violation of 18 U.S.C. 1951. He was sentenced to one year's imprisonment. The court of appeals affirmed (Pet. App. A).

1. The evidence showed that in December 1967, Louis King owned The Scene Cocktail Lounge where he sold beer purchased from Anhauser-Busch Company and liquor purchased through Continental Distributing Company (Tr. 151, 153).[1] Both companies distributed from outside the state of Illinois to The Scene Cocktail Lounge during the period covered by the indictment (Tr. 108-109, 122-124, 132-135, 144-145).

In the latter part of November or the early part of December 1969, petitioner, an officer in the Chicago Police Force and vice-coordinator of the district which included The Scene, visited King at the lounge (Tr. 154-156, 159-160, 226). Petitioner was in plain clothes and was accompanied by two or three other police officers in plain clothes (Tr. 154-156). They sat at the bar and began to converse with Louis King. Petitioner asked King, "How is it going?" He also asked if King had any problems. King replied that he did have problems with parking outside the lounge. King's license permitted him to operate until 4:00 a.m. and the street in front of the lounge was subject to a 3:00 a.m. to 7:00 a.m. parking ordinance with alternate parking on each side of the street. King told petitioner that usually on week-ends, when he was very busy, he would have to pay a policeman $10 or $20 to avoid trouble. King also told petitioner that uniformed police officers had been coming into the lounge during the wek to tell him that he was

[1] "Tr." refers to the transcript of proceedings at trial.

operating his lounge after hours. King told petitioner that there was no basis for this allegation because he was not open after hours (Tr. 156-158). Petitioner then asked King, "Is there a place that is more quiet?" where they could continue the conversation (Tr. 158). Petitioner and King then entered a back room where petitioner said to King "In order to avoid all this bull shit why don't you pay so much a month?" King then asked, "Now what's the mutuals?" Petitioner replied, "Well you tell us." King responded, "Well how about fifty dollars a month?" Petitioner replied, "Well, O.K." (Tr. 159). King then asked his wife who was working as a waitress to bring him a $50 bill. Mrs. King gave King the bill and King in turn gave it to petitioner (Tr. 159, 212).

King testified that at the time of the conversation with petitioner he knew petitioner was a vice-coordinator and that he paid petitioner because he was afraid not to do so would jeopardize his liquor license and subject him to more harassment (Tr. 161).

Just before Christmas of the same year, petitioner and three other plainclothes officers again entered The Scene. They had a drink and engaged King in conversation. One of the officers brought up the question of a gift to the Commander. King, when asked what he was going to give the Commander, showed the officers a ceramic bottle of Grand Metaxa liquor. One of the officers then said, "Well what about us?" King replied, "O.K. Stop around Christmas and I will have something for you" (Tr. 163). As a re-

sult of this conversation, King felt that if he did not cooperate it would lead to a charge of liquor violations and possible loss of his license (Tr. 164).

Later during Christmas week, petitioner drove to The Scene about 7:00 p.m., before the longe had opened. He had previously called the lounge and spoken to Mrs. King to make sure that someone would be there (Tr. 164-165, 221). Petitioner parked his car in front of The Scene. King opened the door for petitioner and after exchanging greetings King helped petitioner carry more than two cases of liquor to petitioner's car. This liquor was worth approximately $300 (Tr. 165).

During the same week King had another conversation with petitioner at the police station. King said to petitioner, "What's going on? I am paying $50 a month and last night I was brought into the station, I was forced to pay $300 by a sergeant and patrolman." Petitioner said that he was unaware of the incident and they had better go see the boss. Petitioner and King then went upstairs to the Commander's office. Petitioner went inside while King waited in the secretary's office. After three or four minutes, King went inside with petitioner. In the presence of petitioner, King told the Commander, "Why am I paying $50 a month when I am brought into the station for after hours and forced to pay $300 a month? I don't know what is going on." The Commander said that he had an appointment but, "I will take care of this. Don't worry about it" (Tr. 166-168).

Thereafter, in January 1970, petitioner went to The Scene with other police officers. Petitioner asked King if he could see him. After petitioner and King went to the back room, King called his wife and she gave petitioner $50 (Tr. 168, 213). After petitioner was paid, the Kings had no further parking difficulties in front of the lounge (Tr. 213).

2. Petitioner's contentions that the government failed to prove that the payments affected interstate commerce and constituted "extortion" as defined in the Hobbs Act, were properly rejected in the opinion of the court of appeals. We rely upon the following portion of the opinion (Pet. App. A, pp. A8-A12):

> Extortion is an offense against the United States when the extorter "in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, . . ." 18 U.S.C. § 1951(a). In order to satisfy the interstate commerce element, the government offered proof that some of the beer and liquor purchased for The Scene had out of state origins, that in one instance a national corporation shipped its product across state lines to a Chicago warehouse from which it was delivered to The Scene and that in another instance a local company purchased liquor from out of state producers and then resold it to The Scene and others.
>
> Relying primarily on cases applying the Fair Labor Standards Act, defendant argues that by the time The Scene acquired these beverages they were no longer in interstate commerce and that any extortion therefore could have no effect on interstate commerce. Because of differences

in the statutes, such decisions are not controlling as to the requisite manner or degree of interference with commerce that may justify conviction under the Hobbs Act. *United States* v. *Kramer*, 355 F.2d 891, 896 (7th Cir., 1966), *vacated in part on other grounds*, 384 U.S. 100.

Although King's business was primarily local, depletion of King's assets by the goods and money extorted, or the cessation of his business if he did not yield and his fears were realized, would tend to reduce the demand for and amount of beer and liquor moving into Illinois. The effect on interstate commerce would exist, though small by most standards, and only indirectly caused by defendant's acts. There are obvious questions as to the most desirable division between the states and the federal government of the function of enforcing good order, but given the existence of an impact of defendant's conduct on interstate commerce, the question is whether the Hobbs Act must be construed as stopping some margin short of full application of the commerce power.

"The commerce clause endows Congress with full and plenary power to do anything and everything necessary to protect interstate commerce—The specific question is whether in the statute involved the Congress has seen fit to exercise all of its power." *Walling* v. *Goldblatt Bros.*, 128 F.2d 778, 781 (7th Cir., 1942).

When a law purports to regulate activities "in commerce" something less than the full commerce power is exercised. *Walling* v. *Goldblatt*, *supra*. On the other hand, at [*sic*] law which regulates matters "affecting" interstate commerce is with-

in, though a more nearly full application of, the commerce power.

Section 1951 clearly contemplates a full application of the commerce power. It proscribes extortion which "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce. . . ." In *United States* v. *Stirone*, 361 U.S. 212, 215, 4 L.Ed 2d 252, 255 (1960), the Supreme Court said of the Hobbs Act:

> " 'That Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence.' The Act outlaws such interference 'in any way or degree.' "

Because Congress has seen fit to exercise its full power under the commerce clause, extortionate conduct having an arguably *de minimis* effect on commerce may nevertheless be punished. *Battaglia* v. *United States*, 383 F.2d 303, 305 (9th Cir., 1967), *cert. denied*, 390 U.S. 907 (extortion resulted in a pool table from an out of state source being kept from use); *United States* v. *Augello*, 451 F.2d 1167 (2nd Cir., 1971), *cert. denied*, 405 U.S. 1070, (assets of drive-in restaurant which purchased mostly from an out-of-state concern depleted by $100; proprietor, in addition, gave $200 from his personal funds.). See also *Glasser* v. *United States*, 443 F.2d 994 (2d Cir., 1971), *cert. denied*, 404 U.S. 854; *United States* v. *Tropiano*, 418 F.2d 1069, 1076 (2d Cir., 1969), *cert. denied*, 397 U.S. 1021; *United States* v. *Mitchell*, 463 F.2d 187 (8th Cir., 1972).

> Where the victim of extortion, as here, customarily obtains inventory which has come from outside the state, obstruction and delay of, and effect upon commerce may, for the purpose of the Hobbs Act, be found in curtailment of the victim's potential as a buyer of such goods. This may be traced either through the depletion of his assets by his fulfillment of the extortionate demands or the harm which would follow if the threats were carried out. See *United States* v. *Pranno*, 385 F.2d 387 (7th Cir., 1967), *cert. denied*, 390 U.S. 944, 972; *United States* v. *Battaglia*, 394 F.2d 304, 312 (7th Cir., 1968), *vacated on other grounds*, 394 U.S. 310; *United States* v. *Amabile*, 395 F.2d 47, 49-50 (7th Cir., 1968). [Footnotes omitted.]

We note in addition that petitioner's reliance on *United States* v. *Kubacki*, 237 F. Supp. 638 (E.D. Pa.), and *United States* v. *Miller*, 340 F. 2d 421 (C.A. 4), is misplaced. In *Kubacki* the court stated that the definition of extortion in the Hobbs Act derived from New York law, under which bribery and extortion are mutually exclusive. But see *United States* v. *Addonizio*, 451 F. 2d 49, 77 n. 35 (C.A. 3), certiorari denied, 405 U.S. 936. Whether or not the New York bribery-extortion distinction is carried over into the Hobbs Act, however, is irrelevant in the instant case. Unlike *Kubacki*, where improper payments were made to obtain the award of a contract, here the payments were made under duress, which is the essence of the crime of extortion. See *Kubacki*, *supra*, 237 F. Supp. at 641; *Addonizio*, *supra*, 451

F.2d at 72. In *Miller* the defendant attempted to raise extortion as a defense to the charge of bribery (the converse of petitioner's claim here). The court in *Miller* pointed out that there was no proof of any threat of economic harm. Here, on the other hand, there was ample evidence from which the jury could infer that King made the payment to petitioner under the implied threat of economic harm.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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